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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DANYELL McCLAIN,

Defendant and Appellant.

D056095

(Super. Ct. No. SDC218393)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

Michael Danyell McClain appeals from a judgment following his entry of a guilty plea to residential burglary after the superior court denied his motion to suppress evidence uncovered when he was detained and subjected to a pat down search. He contends that the superior court erred in denying his motion based on findings that the police had probable cause to detain him and that the search was proper as an incident thereto. We conclude that the detention and search were proper and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

In the early afternoon of January 23, 2009, Edna Garcia heard dogs barking and went into her front yard, where she could see a man behind a wall abutting the back yard of her neighbor's house at 1647 Altadena Avenue in San Diego. The man, an African-American who was wearing a black leather jacket, a white t-shirt, dark pants and a baseball cap with blue and gold or brown on it, was lying on the ground behind some vegetation outside the wall and appeared to be acting as a lookout, periodically raising his head up to look over the vegetation toward the house. Suspicious, Garcia called 911 on her cell phone.

After five or ten minutes without a response, Garcia called 911 again, indicating that two other men had come out of the house, jumped over the wall, which ran along Euclid Avenue, and joined the lookout man. Garcia saw the men taking off gloves as they walked and followed them as they headed south on Euclid Avenue, toward a nearby Jack-in-the-Box restaurant. She continued talking to the dispatcher to provide updates as to the men's location and more details about what they were wearing.

Garcia described all three men as African-American males in their 20s. She indicated that one of the two men who joined the lookout man was wearing a black leather jacket, dark pants and a baseball cap, and the other one was wearing a gray jacket with designs on it and dark pants. She reported that all three men were carrying plastic grocery bags. Garcia continued to follow them until they turned from Euclid Street onto Federal Boulevard, near the Foodland grocery store.

At about the same time, one of the responding officers saw three African-American men whose ages and clothing fit the descriptions Garcia had given, walking west on a Federal Boulevard frontage road near 49th Street. The officer stopped the men and told them he wanted to talk to them in connection with a reported burglary. As he did so, a second officer arrived.

Because the men outnumbered them and were wearing baggy and layered clothing, the officers were concerned that they might be carrying weapons or tools that could be used as weapons; for their own safety, the officers patted them down. The officer who frisked the first man (Maurice Sandifer) found a pair of gloves in his pocket. The second man (Gregory Baul) also had gloves and was holding a plastic grocery bag.

A third responding officer frisked McClain, finding another pair of gloves in his jacket pocket. The officer also felt something hard and rectangular next to McClain's back, under his jacket. The officer lifted up the jacket and found several movie DVDs tucked in McClain's waistband. McClain claimed that he had just picked up the DVDs from a store down the street, but could not give any specifics about where he had gotten them.

Meanwhile, police went to the victim's house, finding it in disarray and that a bedroom window had been broken. They spoke with Garcia, who later identified the men in a curbside lineup. The police arrested McClain, Baul and Sandifer, charging them with residential burglary. Pieces of jewelry found in the grocery bag that Baul was holding and the movie DVDs found in McClain's possession were later identified as belonging to the victim.

Prior to trial, McClain filed a motion to suppress the evidence discovered as a result of the search, arguing that the officers had no basis for believing that the men were armed, thus rendering the pat down search invalid, and that, even if a limited search was justified, the officers exceeded the scope of a permissible search when they retrieved the DVDs. The court denied the motion, finding that Garcia's descriptions of the men, their specific clothing, their movements and their proximity to the crime scene shortly after the burglary took place constituted reasonable grounds to believe that they had been involved in a burglary and established "probable cause to arrest these guys." The court did not reach the issue of whether the police were justified in conducting a pat down search, instead concluding that the search was in any event incident to a valid arrest.

McClain thereafter agreed to plead guilty to residential burglary and admit a serious felony prior in exchange for a seven-year stipulated sentence. As part of the agreement, McClain reserved his right to appeal the denial of his suppression motion. McClain was sentenced immediately and thereafter filed a notice of appeal and unsuccessfully sought a certificate of probable cause. This appeal ensued.

## DISCUSSION

McClain argues that the trial court erred in finding that there was probable cause to arrest him at the time of the original detention and thus the search and seizure were justified as an incident thereto.

### 1. *Standard of Review*

In reviewing the denial of a suppression motion, we must view the facts in the light most favorable to the respondent and uphold all express and implied factual findings

of the trial court to the extent that substantial evidence supports them. (*People v. Valenzuela* (1999) 74 Cal.App.4th 1202, 1206-1207.) Once we do that, we independently apply constitutional standards to those facts. (*Id.* at p. 1207.) Thus, although McClain contends that the trial court erred in concluding that the search and seizure were constitutionally justified as incident to a lawful arrest, we are not bound by the trial court's application of constitutional principles. (*Ibid.*) Rather we must apply those principles ourselves and determine whether the detention, search and seizure were valid.

## 2. *The Detention*

For the purposes of the Fourth Amendment, there are three different categories or levels of police contacts or interactions. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) First, there are " 'consensual encounters,' " those in which there is no restraint of an individual's liberty whatsoever; such encounters may properly be initiated by law enforcement even if there is no " 'objective justification' " for a stop. (*Ibid.*) Second, there are " 'detentions,' " which are seizures that are strictly limited in duration, scope and purpose and that may be undertaken by the police " 'if there is an articulable suspicion that [the detained] person has committed or is about to commit a crime.' " (*Ibid.*) The third category of contacts are seizures of an individual that exceed the permissible limits of a detention, including formal arrests and restraints on an individual's liberty that are comparable to arrests. Such contacts are constitutionally permissible only if the police have probable cause to arrest the individual for a crime. (*Id.* at pp. 327-328.)

A detention is reasonable under the Fourth Amendment when the facts known to the officer, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be or may have been involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231.) Although probable cause is not required, an investigative detention cannot be premised on mere curiosity, rumor, or hunch. (*In re Tony C.* (1978) 21 Cal.3d 888, 893, citing *Terry v. Ohio* (1968) 392 U.S. 1, 22 (*Terry*).) Rather, the detention must be justified by specific and articulable facts that make it objectively reasonable for an officer in a like position, drawing on training and experience, to suspect that (1) a crime has occurred or is occurring and (2) the detainee was or is involved in it. (*In re Tony C.*, *supra*, at p. 893.)

Applying these standards here, we conclude that the officers' initial detention of McClain, Baul and Sandifer was constitutionally valid. The officers who responded to Garcia's 911 calls saw three African-American men in their 20s, wearing clothing that had been described by Garcia with enough particularity to allow them to be distinguished from the public at large. The officers encountered them close in time to when the burglary occurred (and very close in time to when Garcia reported last seeing them), when they were walking in the vicinity of where the burglary took place and in the precise area where Garcia had seen them heading when she lost sight of them.

Although the evidence showed that it was not uncommon for African-American men to walk in the area where the men were stopped, there was no evidence that there were other African-American men walking in the area at the time of this detention. Considered together, the foregoing facts were sufficiently specific to justify the officers'

detention of the men for further investigation. (See e.g., *People v. Harris* (1975) 15 Cal.3d 384, 389 ["[w]here there is a rational belief of criminal activity with which the suspect is connected, a detention for reasonable investigative procedures infringes no constitutional restraint"]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382.)

### 3. *The Pat Down Search*

When an officer detains a suspect, he or she may pat down the suspect's outer clothing if he or she has reason to believe the suspect may be armed. (*Terry, supra*, 392 U.S. at p. 30; *People v. Lopez* (2004) 119 Cal.App.4th 132, 135-136.) This standard is met when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Terry, supra*, at p. 27.) Stated another way, such a search is justified when there are "specific and articulable facts," and rational inferences therefrom, to reasonably support a suspicion that the suspect is armed and dangerous. (*People v. Dickey* (1994) 21 Cal.App.4th 952, 956.)

Here, the officers encountered McClain and his two cohorts in a high crime area and after receiving a report that three men wearing similar clothing had committed a nearby residential burglary, a crime that suggests the possible presence of weapons. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1229-1230; *People v. Myles* (1975) 50 Cal.App.3d 423, 430.) The men outnumbered the officers and were wearing layered and bulky clothes, where weapons might be easily secreted. These circumstances supported a reasonable belief that the men were armed and dangerous and thus permitted the officers to conduct a limited pat down for weapons for safety purposes. (*Terry, supra*, 392 U.S. at p. 27.)

The fact that the men cooperated with the officers during the initial detention does not alter this conclusion, because "it would be . . . 'utter folly' to require [an officer] to wait to search so as to protect [himself] until [after] there is 'an overt act of hostility.' " (*People v. Samples* (1996) 48 Cal.App.4th 1197, 1210.) Under the circumstances presented, the officers had a reasonable basis for believing that a pat down search was necessary to protect their safety.

#### 4. *Seizure of the DVDs*

Because the sole justification for a pat down search is the protection of the police officer and others nearby, the search must be limited to one that is reasonably designed to discover guns, knives, clubs, or other hidden instruments. (*Terry, supra*, 392 U.S. at p. 29.) Although the reasonableness of a challenged search is determined from the totality of the circumstances (*id.* at p. 22), the scope of the search generally must be limited to a protective frisk of a suspect's outer garments. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375; *Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 162.) If the search exceeds the scope of what constitutional principles allow, the detention becomes a de facto arrest and thus requires probable cause. (*In re Justin B.* (1999) 69 Cal.App.4th 879, 887.)

Where a pat down search reveals an item that might qualify as an atypical weapon, an officer may be justified in extending the scope of the search to uncover the item to determine whether it is in fact something that might be used as a weapon. (See *People v. Collins* (1970) 1 Cal.3d 658, 663.) Here, however, although the officer who frisked McClain testified that he thought the DVD cases felt somewhat like a brick or a similar



item that could be used to assault someone, the trial court specifically declined to make a factual finding on that point. In the absence of a finding regarding the officer's credibility in this regard, we cannot conclude that this circumstance provides justification for the officer's action in lifting McClain's jacket to reveal the DVDs.

Notably, however, by the time the officer conducted the extended search to determine what the DVDs were, the officers had found gloves in the possession of each of the men and observed the grocery bag in Baul's possession. These discoveries, when coupled with the other facts tying the men to the burglary, established probable cause to effect an arrest and thus the extended search of the DVDs was permissible as an incident thereto. (See, e.g., *People v. Simon* (1955) 45 Cal.2d 645, 648-649 [recognizing that a search incident to arrest may precede an actual arrest so long as the officer has reasonable cause to make an arrest prior to conducting the search]; *People v. Valdez* (1987) 196 Cal.App.3d 799, 806.)

## 5. *Conclusion*

For the reasons set forth above, we find that both the detention and pat down search were supported by reasonable suspicion, that the extended search of the DVDs was based on probable cause to arrest and thus that the trial court properly denied McClain's motion to suppress the evidence against him.

DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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HALLER, J.

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McINTYRE, J.